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No. 71-389

In the Supreme Court of the United States

OCTOBER TERM, 1971

W. TUCKER BLAINE, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The district court's charge to the jury and the jury's verdict (Pet. App. 19) are not reported. The opinion of the court of appeals (Pet. App. 22-26) is reported at 441 F. 2d 917.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1971 (Pet. App. 27). A petition for rehearing and for rehearing *en banc* was denied on June 21, 1971 (Pet. App. 28). The petition for a writ of certiorari was filed on September 17, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

446-900—71

QUESTION PRESENTED

Whether insurance expirations are part of an insurance agency's goodwill, and are therefore nondepreciable as a matter of law, because goodwill has an indeterminate useful life.

STATUTE AND REGULATIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth in Appendix A to the petition (Pet. App. 13–18).

STATEMENT

Petitioners were partners in an insurance agency. During 1962, the agency purchased more than 2,000 fire and casualty insurance expirations—records showing the name of the insured, the date of expiration of his policy, the premiums, the property covered, and the terms of insurance. Such expirations are valuable, in that they place the owner in a position to secure renewal of the policy and new business, and thereby to earn commissions. (Pet. App. 23–24.)

In this litigation involving the taxable years 1962–1964, petitioners claimed that they were entitled to depreciate the cost of the expirations over a six-year period. The Commissioner disallowed the deductions on the ground that insurance expirations constitute part of the goodwill of an insurance agency and, therefore, are nondepreciable, since goodwill does not have a reasonably ascertainable useful life. (Pet. App. 22–23.)

Following a jury trial, the district court, rejecting the government's motions for a directed verdict and

for judgment n.o.v., entered judgments for petitioners pursuant to the jury verdict (Pet. App. 19, 20, 23). The court of appeals reversed, holding that the expirations were not depreciable as a matter of law (Pet. App. 22-26).[1]

ARGUMENT

The decision below is correct. There is no conflict or any other reason for further review.

1. An intangible asset may qualify for the allowance for depreciation if it is known to be of use in a business for a limited time which can be estimated with reasonable accuracy. Treasury Regulations 1.167(a)-3. But goodwill—those advantages and qualities of a business which attract customers and patronage (see *Menendez* v. *Holt*, 128 U.S. 514)—is not depreciable because it has an indeterminate useful life. Treasury Regulations 1.167(a)-3: *Marsh & McLennan, Inc.* v. *Commissioner*, 420 F. 2d 667 (C.A. 3).

For an insurance agency, insurance expirations are in the nature of goodwill. In the first instance, they enable the agency to secure policy renewals. But, contrary to the assumption implicit in petitioners' argument, the value of insurance expirations does not necessarily end with the failure of particular policyholders to renew their policies. It may well persist indefinitely in the form of new business resulting from

[1] Having held for the government on the principal issue, the court of appeals found it unnecessary to reach the government's alternative arguments that petitioners' "cost" of insurance expirations was substantially less than that claimed, and that the finding of a six-year useful life for the expirations was clearly erroneous, assuming the expirations were depreciable.

referrals and from those policyholders who allow their policies to lapse, but later seek insurance coverage. The appellate courts and the Tax Court consequently have held that insurance expirations have an indeterminate useful life and are not depreciable. See *Marsh & McLennan, Inc.* v. *Commissioner, supra; Salome* v. *United States,* 395 F. 2d 990 (C.A. 5); *Comissioner* v. *Killian,* 314 F. 2d 852 (C.A. 5); *Thoms* v. *Comissioner,* 50 T.C. 247; see also, *Skilken* v. *Commissioner,* 420 F. 2d 266 (C.A. 6) (vending machine locations); *Golden State Towel and Linen Service, Ltd.* v. *United States,* 373 F. 2d 938 (Ct. Cl.) (customer lists); *Boe* v. *Commissioner,* 307 F. 2d 339 (C.A. 9) (medical service contracts); *Thrifticheck Service Corp.* v. *Commissioner,* 287 F. 2d 1 (C.A. 2) (customer contracts); *Meredith Pub. Co.* v. *Commissioner,* 64 F. 2d 890 (C.A. 8) (subscription list).

2. There is no conflict with the Second Circuit's decision in *Haberle Crystal Springs Brewing Co.* v. *Clark,* 30 F. 2d 219, reversed on other grounds, *Clark* v. *Haberle Brewing Co.,* 280 U.S. 384, as petitioners assert (Pet. 11). In *Haberle* the taxpayer was permitted a deduction for the obsolescence of its goodwill because, by reason of the passage of the prohibition amendment to the Constitution, its business was terminated. The instant case does not involve a terminating business but a continuing one. Moreover, the Second Circuit has since made it plain that it adheres to the uniform rule that where a business continues, the cost of goodwill may not be deducted currently. *Thrifticheck Service Corp.* v. *Commissioner,*

supra; United States Industrial Alcohol Co. v. *Helvering,* 137 F. 2d 511 (C.A. 2).[2]

3. Contrary to petitioners' claim (Pet. 7–9), the court of appeals neither passed on the credibility of witnesses nor substituted its factual determinations for those of the jury. The court made no factual findings at all. It merely followed its prior decisions in *Killian* and *Salome,* and held that insurance expirations are not depreciable as a matter of law. The court's references to the evidence were only in the context of petitioners' failure to show that their insurance expirations were different from those considered in the earlier cases.[3]

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[2] Petitioners cite (Pet. 11, n. 7) several trial court decisions permitting depreciation of insurance expirations. These decisions afford no basis for review by this Court. Moreover, all of the cited cases were decided before the recent decisions of the Third and Fifth Circuits and the Tax Court.

[3] By motion filed in this Court on September 23, 1971, petitioners seek an order compelling the government to furnish a list of court cases and controversies pending before the Internal Revenue Service involving the issue herein. A subscription service setting forth all pending court litigation by subject matter is available to all taxpayers upon request and payment of the appropriate fee to the Clearing House for Federal Scientific and Technical Information, U.S. Commerce Department. See T.I.R. 993, October 7, 1968, 1968 CCH Standard Federal Tax Reporter, par. 6929j, Vol. 7. The Internal Revenue Service advises that there are presently pending six court cases dealing with the proper treatment of insurance expirations. No information is available with respect to the number of cases pending at the administrative level, and it would involve considerable time, effort and expense for the National Office of the Internal Revenue Service to communicate with the approximately 100 district director and appellate division offices in the country and then to collate the data received, in order to com-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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pile a list of cases pending at the administrative level. In any event, we know of no authority authorizing discovery in this Court in cases on the appellate docket. While the issue raised here does recur, it will be time enough to consider whether it is of sufficient importance to warrant review by this Court if a conflict develops in the circuits.

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